

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a truck driver for respondent. On August 6, 2003, claimant was making a delivery in Wichita, Kansas, as he picked up the end of a box, he felt something pop in his back and experienced immediate back pain. He reported the incident and was told to seek medical attention.

Claimant was taken off work and provided conservative treatment including physical therapy. An MRI, on August 18, 2003, revealed a normal lumbar spine. On October 3, 2003, the claimant was released to return to work without restrictions and told to return to the doctor as needed.¹

Although claimant felt that his back was not much better, he returned to work and expected his condition would improve because the doctor told him his back would get better if he just used it. Claimant testified that he continued complaining to respondent that his back was still bothering him, and that his back condition deteriorated as he continued driving and making deliveries which included stops in Kansas.

In September of 2004, claimant repeatedly complained to his driver manager, Denise Stedman, that because of his back complaints he was unable to sit and drive very long, and that as a result his mileage average was decreasing. Finally, claimant requested medical treatment and was told to contact the workers compensation department. When claimant contacted the designated individual he was denied further treatment because of the time lapse since his August 2003 injury.

Since respondent declined to provide further treatment, the claimant on his own sought additional treatment from Dr. Lawrence Nord, an orthopedic surgeon. Dr. Nord provided treatment consisting of epidural injections and physical therapy. A myelogram CT was ordered which claimant said revealed a bulging disk.

Respondent in November of 2004, referred claimant to Dr. Stephen F. Weiss, an orthopedic surgeon, for an independent medical examination. After taking claimant's history and conducting an examination, Dr. Weiss diagnosed claimant with possible right L4 radiculopathy, but opined that claimant's condition was not causally related to the August 6, 2003 work-related accident because of the absence of medical treatment from claimant's release to return to work in October 2003 until seeking additional treatment in September 2004.

¹ P.H. Trans., Resp. Ex. 4.

Respondent admits claimant suffered an accidental injury on August 6, 2003, but argues claimant failed to meet his burden of proof to establish that his current condition and need for additional medical treatment is related to that incident, or that he suffered a series of work-related accidents after he returned to work.

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.²

Claimant testified that after the initial treatment following the specific traumatic injury to his back on August 6, 2003, his condition was somewhat better but still symptomatic. Claimant returned to work because the doctor told him working would improve his back condition. Unfortunately, that did not occur and it was claimant's uncontradicted testimony that as he continued to perform his job duties his back condition became progressively worse. It was also uncontradicted that claimant notified his supervisors that his back continued to bother him as he worked. Finally his back condition deteriorated and became so painful that he again requested medical treatment. The Board affirms the ALJ's finding that claimant has met his burden of proof to establish he suffered accidental injury arising out of and in the course of his employment.

The Board notes that Dr. Weiss' opinion that claimant's current condition is not related to the August 6, 2003 accident is not persuasive, as it disregards claimant's uncontradicted testimony that his condition never improved after his initial treatment, that he continued to have back complaints, and that his continued work worsened his back condition.

The written claim statute, K.S.A. 44-520a, provides in part:

(a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

Respondent's argument that claimant failed to file a timely written claim was premised upon the fact that claimant only suffered accidental injury on August 6, 2003. However, the Board concludes the claimant suffered a series of aggravations through his

² *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

last day worked on September 29, 2004. Accordingly, the date of accident is September 29, 2004.³ The parties stipulated written claim was filed November 19, 2004, which was within 200 days of the date of accident. The Board finds claimant made timely written claim.

It should be noted that the original incident that initiated claimant's back complaints occurred in Kansas. As previously noted, when claimant was released to return to work he suffered a series of aggravations to that condition through his last day worked. As a truck driver these aggravations were not limited to Kansas. However, claimant testified that his routes took him through Kansas four or five times a month, which included deliveries in this state. Consequently, there is Kansas jurisdiction for the aggravations claimant suffered working for respondent after his initial injury, treatment and release to return to work.⁴

Respondent additionally challenges the ALJ's award of temporary total disability compensation and medical treatment.

The Board's jurisdiction to review preliminary hearing issues and findings is generally limited to the following:

- (1) Did the worker sustain an accidental injury?
- (2) Did the injury arise out of and in the course of employment?
- (3) Did the worker provide timely notice and timely written claim?
- (4) Is there any defense to the compensability of the claim?⁵

Additionally, the Board may review any preliminary hearing order where a judge exceeds his or her jurisdiction.⁶ Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly but

³ See *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

⁴ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

⁵ K.S.A. 44-534a.

⁶ K.S.A. 2003 Supp. 44-551(2)(A).

includes the power to decide it wrongly. The test of jurisdiction is not a correct decision but the right to enter upon inquiry and make a decision.⁷

K.S.A. 44-534a grants authority to an Administrative Law Judge to decide issues concerning the furnishing of medical treatment, the payment of medical compensation and the payment of temporary disability compensation. The preliminary hearing statute found at K.S.A. 44-534a gives the Administrative Law Judge authority to grant or deny the request for medical compensation pending a full hearing on the claim. Thus, the Administrative Law Judge did not exceed his jurisdiction and the Board does not have jurisdiction to review the Judge's preliminary findings regarding temporary disability and medical compensation.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.⁸

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated February 2, 2005, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2005.

BOARD MEMBER

c: Joseph W. Seiwert, Attorney for Claimant
Robert J. Wonnell, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

⁷ See *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

⁸ K.S.A. 44-534a(a)(2).